this remedy shows that due to the lack of remedy both at common law and chancery, and due to the great demand for such a remedy, the statutes were enacted. In the case of *In re Ungaro*, 88 N.J. Eq. 25, 102 Atl. 244 (1917), the court of chancery admitted it would have been unable to construe wills and other written instruments prior to the statute but that now such a declaratory remedy was available.

In the principal case the dissenting opinion is apparently well supported by authority in its position that the declaratory judgment was purely a creature of statute and not within the inherent jurisdiction of chancery. It is well settled in Ohio that the question of the appealability of a case depends upon whether the basic principle of the statute is equitable in character and based upon some equitable doctrine. *Harper & Kirschten Shoe Co.* v. *The S. & B. Shoe Co.*, 16 Ohio App. 387 (1922). Clearly the basic principle and character of the declaratory judgment statute is not equitable. Therefore the declaratory judgment is not a chancery case and can not be appealed on both questions of law and fact.

To have the appellate review of the declaratory judgment on law alone will in no manner harm the effectiveness of the declaratory judgment remedy or do violence to any sound principle of policy. On the contrary it will better serve the declaratory judgment, the aim of which is speed and simplicity in securing the relief sought, by avoiding a trial *de novo* on appeal thus securing greater dispatch in the final disposition of the litigation.

KARL RUEDIGER

REAL PROPERTY

LAND TRUST CERTIFICATES

The testatrix, Frances Helen Rawson, transferred personal property to a trustee. With her consent and approval, a part of the income was invested in certain "land trust" certificates. At her death, these formed a part of the estate and the question was whether they passeed by the will to the devisees of the real estate or to the legatees of the personal property. The court, construing the will and declaring the rights of certain beneficiaries, held the certificates passed as real estate to the devisees named in the will. The judgment was affirmed by the Court of Appeals. *The First Natl. Bank, Exr.*, v. *Davis*, 56 Ohio App. 388, 9 Ohio Op. 443 (1937).

Land trust certificates are a comparatively recent development of

the ancient form of investment known as ground rent. The usual method of creation is for the holder of the title to transfer it to a trustee, natural or corporate, who then makes a long-term lease, renewable forever, with a privilege of purchase. Certificates of beneficial interest are issued and the holders become owners of a proportionate equitable interest in real estate, entitled to a proportionate share of the proceeds of the land, whether rent or purchase price, but with no share in the management. For a general discussion of the subject see Goldman and Abbott, *Land Trust Certificates With Relation to Ohio Law*, 2 Cin. L. Rev. 255 (1928). The result is hardly distinguishable from a Massachusetts or business trust created to deal in land, generally termed a pure trust as distinguished from situations where a reservation of substantial control results in partnership liability. For examples of the form of the certificates and declarations of trust see 3 Jones, *"Mortgages,"* Secs. 2510-2527 (1928); Bogert, *"Trusts and Trustees,"* V. 6, Secs. 1102-1106 (1935).

As indicated by the principal case, the controlling factor is the nature of the interest held by the *cestui que* trust or certificate holder. That interest has become increasinly one *in rem* and is now substantally equivalent to equitable ownership of the trust *res*, the *cestui que trust* of course retaining certain *in personam* rights. Scott and Stone, *Nature of the Rights of the Cestui Que Trust*, 17 Col. L.R. 269, 467 (1917); Bogert, *supra*, V. 1, Sec. 183. Since the certificate holder's interest is an equitable interest in realty, the decision in the principal case follows logically from early Ohio cases holding that equitable interests in land are real interests and subject to the laws of descent relating to interests in land. *Lessee of Avery* v. *Dufrees*, 9 Ohio 145 (1839); *Biggs* v. *Bickel*, 12 Ohio St. 49 (1861); *Bolton* v. *Bank*, 50 Ohio St. 290, 33 N.E. 1115 (1893).

The nature of the certificate holder's interest is especially important in the field of taxation, under the general principles that tangibles are assessed by the law of the situs, intangibles by the law of the domicile of the owner, and that the courts will be reluctant to tolerate double taxation. Hicks, *Nature of the Right of a Cestui Que Trust with Particular Reference to Taxation*, 2 O.S.L.J. 321 (1936); Bogert, *supra*, V. 2, Sec. 262, 263. In *Senior* v. *Braden*, 295 U.S. 422, 55 Sup. Ct. 800, 79 L. Ed. 1520, 100 A.L.R. 794 (1935) the Supreme Court held that an attempt to tax the holder's interest in the certificate as an intangible was an improper tax on the realty, although measured by a percentage of the income. It had been previously indicated in Ohio that holders of land trust certificates were not required to list them for taxa-

tion. 1926 Atty. G. Op. 375. However, it seems the income is clearly subject to the federal income tax as "income from fiduciaries" and also to a state income tax levied on it as such and not as a property tax. The Supreme Court recently held income from rents of land taxable to the recipient at the place of his domicile although the land is located outside the state. *People* v. *Graves*, 300 U.S. 308, 57 Sup. Ct. 466, 81 L. Ed. 666 (1937). The holder is thus subject neither to personal property taxes, since he has an interest in realty, nor to real property taxes, since they are paid by either the trustee or lessee. Land trust certificates are properly included in an estate tax, and subject to inheritance, succession, or death transfer taxes in the state where the land lies. *Bates* v. *Probate*, 131 Me. 176, 160 Atl. 22 (1932); *Baker* v. *Commissioner*, 253 Mass. 130, 148 N.E. 593 (1925); *Peabody* v. *Stevens*, 215 Mass. 129, 102 N.E. 435 (1913); *Trust Co.* v. *Schnader*, 293 U.S. 112, 55 Sup. Ct. 29, 79 L. Ed. 228 (1934).

In some cases, the intent of the parties has been given weight and they have been allowed to control the nature of the property by a clause in the trust agreement providing that the holder's property is to be treated as personal property for all purposes and that he shall have no interest in the realty held by the trustee. *Duncanson* v. *Lill*, 322 Ill. 528, 153 N.E. 618 (1926); *Sweesy* v. *Hoy*, 324 Ill. 319, 155 N.E. 323 (1927). The same result has been reached by necessary implication from the trust agreement. *In re Stephenson's Estate*, 171 Wis. 452, 177 N.W. 579 (1920).

Since a trust means equitable ownership in the property held by the trustee and the certificate holder is therefore an equitable owner of realty, it seems extremely doubtful that the parties can control the question of the holder's interest by mere agreement, although the result might be a practical one. In order to regard the corpus of the trust as personalty for purposes of taxation, the doctrine of equitable conversion has been invoked in the case of business trusts where there is mixed personalty and realty or specific directions to sell the realty. *Bates* v. *Probate, supra; Dana* v. *Treasurer*, 227 Mass. 562, 116 N.E. 941 (1917); *Priestley v. Treasurer*, 230 Mass. 452, 120 N.E. 100 (1918); *In re Stephenson's Estate, supra.*, Massachusetts has refused to apply it where the trust res consists entirely of realty, despite the expressed intention of the parties to regard it as personal property. *Baker* v. *Commissioner, supra.* But it seems impossible to apply it to land trusts where there is only an option of purchase and the trustee merely collects income for the certificate holders. Bogert, *supra*, V. 2, Sec. 250. This is especially true in Ohio where the conversion takes place at the time of exercis-

ing the option and will not relate back to the time of the execution of the lease. *Smith, Adm'r.* v. *Loewenstein*, 50 Ohio St. 346, 34 N.E. 159 (1893).

The holder is obviously not concerned with recordation, the title being in the name of the trustee. Land trust certificates are transferable upon surrender to the trustee and the issuance of a new certificate to the transferee, but are not negotiable, being subject to the terms of the trust agreement on their face. It has been held that a "spendthrift statute" does not apply to a business land trust. *Baker* v. *Stern*, 194 Wis. 233, 216 N.W. 147 (1927). The same construction of similar statutes will remove the principal obstacle to alienability. However such a transfer, it seems, is the conveyance of an interest in land and so subject to provisions requiring a written memorandum and a formal writing for the conveyance itself. Bogert, *supra*, V. 1, Sec. 190; *Bartlett* v. *Gill*, 221 Fed. 476 @ 485 (1915). Thus in Ohio the transfer would be governed by Ohio G. C., Sec. 8620-8621, and the signature in the spaces provided on the certificate would seem to be sufficient compliance. It is submitted that compliance with Sec. 8510, providing for the signatures of two witnesses and an acknowledgment by the grantor, is not essential since the section expressly refers to a deed, mortgage, or lease of any estate or interest in real property. And under Sec. 10502-1 a release of dower by the spouse of the transferor is not required. Such certificates as are held at death would form a part of the estate and be governed by descent and distribution. See Sec. 10503-4.

While the holder's interest is not subject to legal execution, it seems clear that it can be reached by proceedings in aid of execution under Sec. 11760 *et seq.*

Regulation under "blue sky" and similar laws appears desirable in the usual case of the large land trust. Ohio has held "membership receipts" in an association entitling the owner to a pro rata share in earnings and profits are subject to such regulations, in accordance with the tendency to regard business trusts as more and more like corporations for purposes of regulation and taxation. *Groby* v. *State*, 109 Ohio St. 543, 143 N.E. 126 (1924). The Ohio Attorney General has ruled that land trust certificates representing an interest in land in other jurisdictions should be qualified for sale in the same manner as foreign real estate, 1926 Atty. G. Op. 528; that anyone selling such instruments should be licensed as a real estate broker, 1929 Atty. G. Op. 1664; and that certificates of beneficial interest of a common law trust should be qualified under the Ohio Securities Act before being sold in Ohio by a licensed dealer in securities, 1931 Atty. G. Op. 992. Rhode Island

has held "mineral deeds," technically conveying interest in Texas realty, are securities under a statute requiring the sellers to register as brokers. *State* v. *Pullen*, 192 Atl. 473 (1937). The Securities Exchange Act includes in its definition of security "a certificate of interest or participation in any profit sharing agreement," 15 U.S.C.A. Sec. 77b, and regulation under the act has been extended to participation trust certificates in producing oil royalties. *Securities and Exchange Commission* v. *Jones*, 12 Fed. Supp. 210 (1935). Reversed on other grounds in 298 U.S. 1, 56 Sup. Ct. 654, 80 L. Ed. 1015. Similar regulation of land trust certificates appears plausible, since we really have a business entity separate and apart from the certificate holders, and especially since the land held in trust is frequently located in several states. See, for example, the land trusts involved in *Senior* v. *Braden, supra.*

There is little other mention of land trust certificates, as such, in Ohio. Ohio Gen. C. Sec. 710-140 (d) permits banks to invest funds in land trust certificates under certain restrictions. Curiously enough, the attorney general ruled that in assessing the shares of a bank for taxation, county auditors could not include land trust certificates in the deduction for real estate under Ohio Gen. C. Sec. 5412, the result being an apparent double taxation. 1926 Atty. G. Op. 565, 1929 Atty. G. Op. 1121.

So while there is little reported authority directly in point, the field seems fairly well marked out by references to certain other fundamental principles. It appears we could have avoided confusion and uncertainty and reached a more practical result by regarding the certificates as more nearly analogous to shares of stock. After all, while the certificate holder has certain rights, he never expects to share in the realty, he expressly waives his right to partition in the usual arrangement, he sometimes stipulates that his interest shall be personalty—why not regard him as having merely a bundle of choses in action, standing in a position similar to that of a corporate stockholder? Yet the authority we have is *contra* to such a position and the conclusion that his interest is that of an equitable owner of realty is in keeping with sound legal theory as to the nature of the cestui que trust's interest.

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